**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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| SANTANNA NATURAL GAS CORPORATION<br>d/b/a Santanna Energy Services | ) | |
| | ) | Docket No. 02-0441 |
| Application for Certificate of Service Authority Under §19-110 of the Public Utilities Act, | ) | |

**SANTANNA NATURAL GAS CORPORATION'S**
**REPLY TO THE ATTORNEY GENERAL'S BRIEF ON EXCEPTIONS**

Santanna Natural Gas Corporation ("Santanna"), by one of its attorneys, Paul F. Markoff, pursuant to 83 Ill. Admin. Code §200.830, states the following as its reply to the *Brief On Exceptions Of The People Of The State Of Illinois* ("*AG Brief On Exceptions*"),[1] and in support of its application for certification under the Alternative Gas Supplier Law ("AGSL"), 220 ILCS 5/19-100, *et seq*.

## I. THE ALJ SHOULD NOT MAKE THE AG'S PROPOSED CHANGE TO PARAGRAPH 23.[2]

The AG states that the Commission can consider Santanna's past performance because the AGSL specifies that the Commission can consider "other information submitted by the applicant." 220 ILCS 5/19-110(e). The AG contends that Santanna's past performance is "information submitted" by Santanna. *AG Brief On Exceptions*, pp. 3-4.

The telling weakness in the AG's contention is his failure to cite any case law, rule of statutory construction or other authority in support of his position. No case law could support the construction that the AG places on Section 110(e). There are two, independent mistakes in the AG's construction of Section 110(e).

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[1] Santanna refers herein to The People of the State of Illinois as "AG"

[2] In addition to declining to make the changes to Paragraph 23 that the AG urges, the ALJ should make the changes to Paragraph 23 that Santanna proposed in its *Brief On Exceptions*. See *Santanna's Brief On Exceptions*, pp. 9-11.

*First*, Santanna did not submit its past performance. Santanna did not affirmatively offer any documents, testimony or other evidence in its case-in-chief in support of its application for a certificate of authority. The reason Santanna did not submit its past performance is that it is not relevant to any AGSL prerequisite. The record in this proceeding clearly reveals that Santanna did not submit its past performance for the Commission's consideration. The AG has not provided any citation to the contrary.

The AG, the Citizen's Utility Board ("CUB") and the Staff of the Illinois Commerce Commission ("Staff") – not Santanna – put at issue Santanna's past performance and submitted evidence of Santanna's past performance. Even though Santanna viewed the evidence as improperly considered (and in the least deserved little weight in light of Santanna's timely and successful improvements to its operations and materials), in the absence of a ruling supporting its position, Santanna was compelled to respond to this criticism by showing in rebuttal that the criticism was unfounded or otherwise insignificant. Santanna's rebuttal proved its implementation of successful changes to its program and its satisfaction of the AGSL prerequisites by the end of the grace period.

Even if Santanna's showing of its commendable performance were considered a submission by Santanna -- and it is not a submission -- the AG's contention would still fail. Any evidence that could possibly be considered submitted by Santanna is strictly evidence of Santanna's commendable performance. Accordingly, under language that the AG relies upon in Section 110(e), the ALJ could consider only evidence submitted by Santanna. Clearly, Section 110(e) does not state that the ALJ can consider "such other information as the applicant or other parties to the proceeding may submit."

*Second*, the AG mistakes the meaning of "information." The AG incorrectly equates "actions" with "information."[3] *AG Brief On Exceptions*, p. 4. The AGSL does not provide a definition of either "information" or "past actions." The plain meaning of those words defeats the AG's contention because "actions" are not "information."

Information is defined as "1. The act of informing or state of being informed. 2. Knowledge derived from study, experience, or instruction." Websters II New College Dictionary (2001). In contrast, "action" is defined as "1. The process of acting or doing. 2. An act or deed." *Id.* Under their plain meanings, the words are not synonymous.

Even putting aside the fact that the AG's contention is mistaken under the plain meaning of the words, the AG's contention is also mistaken because it ignores rules of statutory construction. Under Illinois law, "where a word is used in different sections of the same legislative act, unless a contrary legislative intent is clearly expressed, the presumption is that the word is used with the same meaning throughout the act." *People ex rel. Scott v. Schwulst Bldg. Center, Inc.*, 89 Ill. 2d 365, 372, 432 N.E.2d 855, 858 (1982). Hence, the manner in which the legislature used the term "information" elsewhere in the AGSL instructs the definition of the term "information" in Section 110(e).

Elsewhere in the AGSL, the legislature did not use the term "information" in a context that equates information with action. See 220 ILCS 5/19-110(c), 5/19-115(f)(1) and (2). For example, Section 115(f)(1) provides, "Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain **information** that adequately discloses the prices, terms and conditions of the products or services." (emphasis added). The context of the legislature's use of "information" in §115(f)(1) precludes the term from meaning

[3] Santanna has not found any publication stating or suggesting that "actions" is synonymous with "information." The AG has not cited any authority making such a statement or suggestion.

"actions." Accordingly, the legislature's use of the term "information" elsewhere in the AGSL does not support the AG's contention.[4]

Further, there is nothing about the language the AG relies upon, or any other language of the AGSL, that is indicative of a legislative intent to make an applicant's past performance part of the analysis under the prerequisites. If the legislature intended to make an applicant's past performance part of the analysis, it could have easily achieved that result by including explicit language in the AGSL. See *In re County of Kankakee*, 316 Ill. App. 3d 167, 169,736 N.E.2d 604, 607 (3rd Dist. 2000); see also People ex rel. Martin v. Smith, 205 Ill. App. 3d 553, 563 N.E.2d 1170, (4th Dist. 1990) (holding that a statute was drafted such that one sub-subsection was not subject to a particular statute of limitations while another was, and holding that "[i]f this is a problem, it is one of drafting, not of statutory interpretation. If the legislature intended such a limitations period to apply to both subsections, it could have provided a statute-of-limitations clause within" the subsection not subject to the statute of limitation). The legislature did not do so.

In accordance with the foregoing, the ALJ should reject the AG's proposed changes to Paragraph 23.

## II. THE ALJ SHOULD NOT MAKE THE AG'S PROPOSED CHANGE TO PARAGRAPH 82.[5]

The AG contends that the ALJ erred regarding the "primacy" of 83 Ill. Admin. Code §551.100. *AG Brief On Exceptions*, p. 5. The AG does not express the basis for his exception,

[4] As explained in *Santanna's Brief On Exceptions*, construing "information" to include "action" would violated Santanna's equal protection rights by impermissibly allowing for different standards under the AGSL, depending on when the application was submitted, for similarly-situated applicants. pp. 9-10 (*citing Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997); *Illinois-American Water Co. v. Illinois Commerce Comm'n*, 322 Ill. App. 3d 365, 369, 751 N.E.2d 48, 53 (3rd Dist. 2001)).

[5] In addition to declining to make the changes to Paragraph 82 that the AG urges, the Commission should make the changes to Paragraph 82 that Santanna proposed in its *Brief On Exceptions*. See *Santanna's Brief On Exceptions*, pp. 12-15.

and Santanna can discern none. Santanna does not take exception to the primacy of §551.100.[6] The AG further contends that §551.100 "does not affect the Commission's conclusion." *AG Brief On Exceptions*, p. 5. This contention is irreconcilable in at least four important respects.

*First*, the AG's contention is irreconcilable with the Commission's promulgation regarding the managerial prerequisite. See 83 Ill. Admin. Code §551.100. Section 551.100 provides that the Commission must deem an applicant to meet the AGSL's managerial prerequisite if the applicant meets particular qualifications that are set forth therein. It is undisputed that Santanna satisfied those requirements. See *Application*, ¶21 and Exs. G and H thereto; *Amended Application* filed July 12, 2002, ¶¶8-9 and Ex. G thereto; see also *Gatlin Rebuttal*, pp. 3, 5. Indeed, the ALJ found that Santanna satisfied those standards. *Proposed Order*, ¶82. Accordingly, §551.100 does in fact "affect the Commission's conclusion."

*Second*, the AG's contention is irreconcilable with Illinois law. The AG concedes that §551.100 is the Commission's promulgation and implements the AGSL's managerial prerequisite. *Initial Brief Of The People Of The State Of Illinois*, p. 26. Illinois law makes clear that §551.100 has the force of law. *Ress v. Office of State Comptroller*, 329 Ill. App. 3d 136, 142, 768 N.E.2d 255, 260 (1st Dist. 2002). Illinois law also makes clear that the Commission cannot ignore its own promulgation. *Pace Realty Group, Inc. v. Property Tax Appeal Bd.*, 306 Ill. App. 3d 718, 729, 713 N.E.2d 1249, 1257 (2d Dist. 1999). It is difficult to understand the AG's position that the Commission should ignore §551.100, which Illinois law commands the Commission to follow, and should instead focus exclusively on Santanna's past performance,

[6] Santanna does take exception to the ALJ's interpretation of §551.100. Santanna also takes exception to the ALJ's conclusion that Santanna failed to satisfy the managerial prerequisite, to which §551.100 exclusively pertains. Santanna has set forth these exceptions in detail in its initial exceptions brief and will not repeat its arguments and support here. See *Santanna's Brief On Exceptions*, pp. 9-26.

which is clearly not referenced by the AGSL or any promulgation thereunder.[7] The AG's contention is clearly mistaken.[8]

*Third*, it is not reconcilable with the AG's position in its recently-filed briefs in this proceeding. See *Reply Brief Of The People Of The State Of Illinois*, pp. 26-27. *Fourth*, it is irreconcilable with the positions of any of the other parties to this proceeding. See, e.g., *Staff Of The Illinois Commerce Commission's Exceptions To The Proposed Order* and *Initial Brief Of The Citizen's Utility Board*.

The AG next contends that the mandatory language in §551.100 – "[a]n applicant shall be deemed to possess sufficient managerial capabilities to serve residential customers if" – really is not mandatory. *AG Brief On Exceptions*, p. 5. As with the AG's contentions regarding paragraph 23, he does not cite any authority in support of his contention. Section 551.100 is unambiguous and, in light of Santanna's undisputed showing that it satisfied the qualifications therein, the plain language requires the ALJ to find that Santanna satisfied the managerial prerequisite. As such, no resort to rules of statutory construction is necessary. See *People v. Woodard*, 175 Ill. 2d 435, 443, 677 N.E.2d 935, 939 (1997).

Even if there were need to resort to the rules of statutory construction – and there is no need, the AG's contention is quickly shown to be mistaken in other ways.[9] As already discussed above, §551.100 contains the phrase: "[a]n applicant shall be deemed to possess sufficient managerial capabilities to serve residential customers if…." (emphasis added). Under Illinois

[7] Santanna explained in its *Brief On Exceptions* that the consideration of Santanna's past performance in determining whether to grant it a certificate would violate Santanna's equal protection rights by impermissibly allowing for different standards under the AGSL, depending on when the application was submitted, for similarly-situated applicants. pp. 9-10 (*citing Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997); *Illinois-American Water Co. v. Illinois Commerce Comm'n*, 322 Ill. App. 3d 365, 369, 751 N.E.2d 48, 53 (3rd Dist. 2001)).

[8] Although the AG's *Initial Brief* is reconcilable with its contention here (in that they both wholly ignore §551.100), the impropriety the position that the Commission must ignore its own promulgation is readily evident.

[9] Under Illinois law, the rules of statutory construction apply in full to administrative promulgations. *Ress v. Office of State Comptroller*, 329 Ill. App. 3d 136, 142, 768 N.E.2d 255, 260 (1st Dist. 2002).

law, "[a]n important aid in determining legislative intent is the nature of the auxiliary verb used in the statute." *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997). The "[l]egislative use of the word 'may' is generally regarded as indicating a permissive or directory reading, whereas use of the word 'shall' is generally considered to express a mandatory reading." *Ibid.* Accordingly, the AG's contention about the permissive nature of the phrase is mistaken.

Additionally, a fundamental rule is that reasonable meaning must be ascribed to all words and phrases so that they are not rendered superfluous. *A.P. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 532, 714 N.E.2d 519, 523 (1999). This rule highlights an additional mistake in the AG's contention. The phrase "shall be deemed" in §551.100 requires a mandatory reading in order to give meaning to the word "shall."

The AG contends that the word "deemed" transforms the phrase from §551.100 into a permissive reading that creates a rebuttable presumption. *AG Brief On Exceptions*, p. 5. The AG does not cite any authority other than a dictionary definition of "deem." The AG's reliance on the definition of deem does not support his contention. Illinois law requires the words in the phrase "shall be deemed" to be read together. *Illinois Power Co. v. Mahin*, 49 Ill. App. 3d 713, 716, 364 N.E.2d 597, 600 (4th Dist. 1977). Further, the AG's contention is shown to be mistaken by Illinois law prohibiting the ALJ from departing "from the statute's plain language by reading into it exceptions, limitations, or conditions the legislature [or Commission] did not express." *People v. Ellis*, 199 Ill. 2d 28, 39, 765 N.E.2d 991, 997 (2002).

"Deem" is defined as "To Consider or judge." Websters II New College Dictionary (2001). Accordingly, the phrase "shall be deemed" must be read, in the context of the case at bar, to mean that the ALJ must consider Santanna to have satisfied the managerial prerequisite if it meets the qualifications found in §551.100 (i.e., "shall be considered" or "shall be judged").

If the Commission desired to create a rebuttable presumption when it drafted §551.100, it could have easily employed express language to accomplish that end. See *In re County of Kankakee*, 316 Ill. App. 3d 167, 169,736 N.E.2d 604, 607 (3rd Dist. 2000); see also People ex rel. Martin v. Smith, 205 Ill. App. 3d 553, 563 N.E.2d 1170, (4th Dist. 1990). The Commission did not do that.[10] In accordance with the foregoing, the ALJ should reject the AG's proposed changes to Paragraph 82.

## III. THE ALJ SHOULD NOT MAKE THE AG'S PROPOSED CHANGE TO PARAGRAPH 91.[11]

The AG contends that the Proposed Order should contain a draft letter of the notification that Santanna would send to customers in the event that the Commission denies certification.[12] *AG Brief On Exceptions*, p. 6. Santanna objects to the AG's contention on the ground that the ALJ should reverse the holding of the *Proposed Order*, which would moot the issue of a letter from Santanna to customers discussing the discontinuance of Santanna as their natural gas supplier. See generally *Santanna's Brief On Exceptions.*

As to the concept of the letter, Santanna disagrees with the need for the *Proposed Order* to contain a draft letter. The AG cites no authority for the letter, and none is evident in the AGSL or promulgations thereunder.

As to the exact content of the AG's proposed letter, such a directive by the ALJ would infringe on Santanna's First Amendment rights by forcing it to engage in particular speech. See *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169, 1174 (7th Cir. 1987) (holding

[10] The AG's assessment that Santanna's operations were "rife with misinformation and confusion" is unsupported by citation to the record. As such, it violates the Commission's promulgation requiring citation to the record for factual statements. See 83 Ill. Admin. Code §200.830e). Indeed, the record is devoid of any evidence of misinformation.
[11] In addition to declining to make the changes to Paragraph 91 that the AG urges, the ALJ should make the changes to Paragraph 91 that Santanna proposed in its *Brief On Exceptions.* See *Santanna's Brief On Exceptions*, pp. 29-32.
[12] The redline version of Paragraph 91 in the *AG Brief On Exceptions* mistakenly indicates that the fifth, sixth, seventh and eighth sentences in that paragraph are added by the AG. p. 7. The ALJ included those sentences in the *Proposed Order.*

that forced enclosures in utilities' mailings to customers violated the utilities' First Amendment rights). Santanna respectfully suggests that Santanna draft the content of any such letter and submit it to Staff for input before it is mailed to Santanna customers. Accordingly, the ALJ should reject the AG's proposed changes to Paragraph 91.

## IV. THE ALJ SHOULD NOT MAKE THE AG'S PROPOSED CHANGE TO PARAGRAPH 92.[13]

The AG takes exception to the wording of the findings in sub-paragraphs six and seven of Paragraph 92. *AG Brief On Exceptions*, p. 9. As with Paragraph 91, Santanna objects to the AG's exception on the ground that the ALJ should reverse the holding of the *Proposed Order*, which would moot the wording issue that that AG raises. See generally *Santanna's Brief On Exceptions*. For this reason, the ALJ should reject the AG's proposed changes to Paragraph 92.

## Conclusion

For the foregoing reasons, and the reasons stated in Santanna's *Brief On Exceptions*, the ALJ should decline to make the AG's proposed changes, should make the proposed changes contained in *Santanna's Brief On Exceptions*, and hold that Santanna is entitled to a certificate of service authority under the proposed conditions.

SANTANNA NATURAL GAS CORPORATION,

By: _____
Paul F. Markoff, One Of Its Attorneys

Dated: October 25, 2002

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[13] In addition to declining to make the changes to Paragraph 92 that the AG urges, the ALJ should make the changes to Paragraph 92 that Santanna proposed in its *Brief On Exceptions*. See *Santanna's Brief On Exceptions*, pp. 32-33.

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